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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Policy and Rules Concerning the Interstate,
Interexchange Marketplace

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CC Docket No. 96-61

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COMMENTS OF CABLE & WIRELESS, INC.

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SUMMARY

Cable & Wireless, Inc. ("CWI") agrees with the Commission's tentative conclusion that, under Section 10 of the Communications Act of 1934, as amended (the "Act"), the Commission may forbear from requiring nondominant interexchange carriers ("IXCs") to file tariffs. Nondominant IXCs lack market power and simply cannot rationally price their services in ways which, or impose terms and conditions which, contravene Sections 201(b) and 202(a) of the Act. Market forces and the administration of the complaint process will enable the objectives of just, reasonable, and nondiscriminatory rates to be achieved. Moreover, competition is sufficient to curtail carrier practices that could harm consumers. Finally, if carriers have the choice *not* to file tariffs, competition would be promoted. These factors all support forbearance from mandatory tariffing.

CWI disagrees, however, with the Commission's proposal to *prohibit* IXCs from filing tariffs. Because interstate carriers will continue to be obligated under the Communications Act to comply with sections 201 and 202 and remain subject to the Commission's complaint processes, interstate nondominant IXCs should be permitted to file tariffs with the Commission if they choose. The objective of the Commission, in proposing mandatory detariffing, seems to be to make the legal relationship between carriers and customers more closely resemble that between services providers and customers in an unregulated environment. Despite that stated objective, however, the relationship between carrier and customer is not and will not be, for the foreseeable future, analogous to that between service provider and customer in an *unregulated* environment. As long as IXCs continue to carry additional common carrier responsibilities and regulatory burdens that

unregulated companies simply do not have, an IXC is justified in publicly filing in advance the terms and conditions under which it will provide service. IXCs should not have to renegotiate these matters with each prospective customer.

CWI therefore submits that IXCs should be permitted to file tariffs with terms and conditions under which they will offer their interstate services. CWI proposes further that rate information not be filed with "permissive" tariffs. At most, only the inclusion of maximum rates should be allowed. Under either permissive detariffing regime, there would be little or significantly reduced opportunity for anticompetitive pricing behavior.

CWI's proposed regime of permissive detariffing also presents limited opportunity for invocation of the filed rate doctrine to change long-term contracts. Rates will either not be in the tariffs at all or would likely stay below the maximum rate. Moreover, CWI's proposal would not require carriers to file a tariff each time they changed rates. Accordingly, carriers would have the flexibility to change rates in response to market conditions at reduced costs to both carriers and the agency, furthering a central goal of the *Notice*.

In conclusion, the Commission should no longer require nondominant IXCs to file interstate tariffs. However, the Commission should allow nondominant IXCs to file service terms and conditions in tariffs. Rate information should not be accepted or, at most, only maximum rates should be allowed, optimizing carrier flexibility to change rates in response to market conditions while minimizing invocation of the filed rate doctrine.

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COMMENTS OF CABLE & WIRELESS, INC.

Cable & Wireless, Inc. ("CWI"), by its attorneys, hereby comments on Section III of the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceedings.¹

As detailed below, CWI agrees with the Commission's tentative conclusion that it may forbear from requiring nondominant interexchange carriers ("IXCs") to file tariffs under Section 203 of the Communications Act of 1934, as amended ("Communications Act"). However, CWI also submits that nondominant IXCs should be permitted to continue to file interstate tariffs, especially in light of these IXCs' common carrier obligations under Sections 201 and 202 of the Communications Act and the continued applicability of the Section 208 complaint process.

¹ FCC 96-123 (released March 25, 1996).

I. STATEMENT OF INTEREST

CWI is a telecommunications carrier providing a broad range of interstate, interexchange services. CWI views its tariffs on file with the Commission as indispensable to fulfilling its obligations under Title II of the Communications Act. While CWI shares the conclusion in the *Notice* that the forbearance provisions added to the Communications Act by the 1996 Act² allow the agency to forbear from *requiring* IXC's to file interstate tariffs, CWI does not agree as a policy matter that the Commission should therefore *prohibit* IXC's from filing such tariffs. CWI therefore is vitally interested in the outcome of this proceeding.

II. THE COMMISSION CORRECTLY CONCLUDES THAT IT MAY FORBEAR FROM REQUIRING IXC'S TO FILE INTERSTATE TARIFFS

In the *Notice*, the Commission tentatively concludes that, under the recently adopted Section 10 of the Communications Act,³ it must forbear from requiring IXC's to file interstate tariffs.⁴ Section 10 mandates forbearance of any regulation or any provision of the Communications Act to a telecommunications carrier if such enforcement is not necessary to ensure compliance with Sections 201 or 202 of the Communications Act, is unnecessary for the protection of consumers, and if forbearance is consistent with the public interest.⁵ In

² The Telecommunications Act of 1996, Pub. L. 104-104 (enacted Feb. 8, 1996) (the "1996 Act").

³ 47 U.S.C. § 10 added by Section 401 of the 1996 Act.

⁴ *Notice* ¶¶ 27, 32.

⁵ 47 U.S.C. § 10(a).

considering whether forbearance is appropriate, the Commission must consider whether forbearance will promote competition among providers of telecommunications services.⁶

The Commission tentatively concludes in the *Notice* that forbearance is necessary under new Section 10. In reaching this preliminary determination, the Commission reviewed its decisions in its *Competitive Carrier* proceedings,⁷ in which first permissive then mandatory detariffing was ordered, and determined that its analysis regarding competition in the interstate, interexchange marketplace still holds, if not more so.⁸ As a result, the Commission reaffirmed its view that nondominant firms lack market power and "simply cannot rationally price their services in ways which, or impose terms and conditions which, contravene Sections 201(b) and 202(a) of the [Communications] Act."⁹ In other words,

⁶ *Id.* § 10(b).

⁷ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980) ("First Report and Order"); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982); Order on Reconsideration, 93 FCC 2d 54 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 47,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated* *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 113 S. Ct. 3020 (1993); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984); Fifth Report and Order, 98 FCC 2d 1020 (1985), *vacated* *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (collectively referred to as the *Competitive Carrier* proceeding).

⁸ Notice ¶¶ 21 - 25, 27.

⁹ *Id.* ¶ 28 quoting *First Report and Order*, 85 FCC 2d at 31.

market forces and the administration of the complaint process will enable the goals of just, reasonable, and nondiscriminatory rates to be achieved.¹⁰

For similar reasons, the Commission has observed that tariffs are unnecessary to protect consumers from anticompetitive prices and practices, and that competition should be adequate to constrain deleterious carrier behavior.¹¹ Indeed, the Commission suggests, required tariff filings could remove a carrier's ability to respond rapidly to changes in demand and costs, impede and remove incentives to discount prices, and impose costs on carriers that attempt to make new offerings.¹² As explained further in the next section, CWI does not believe tariffs have the negative attributes ascribed to them in the *Notice*. However, CWI does support the Commission's tentative determination that, generally, competition is sufficient to curtail carrier practices that could harm consumers.¹³

Finally, the Commission tentatively concludes that forbearance from mandatory tariffing advances the public interest by deterring price coordination and promoting competition through increased carrier flexibility.¹⁴ The *Notice* reaches no determination on the actual occurrence of price coordination under the current mandatory tariffing regime.

¹⁰ *Id.*

¹¹ *Id.* ¶ 29.

¹² *Id.*

¹³ CWI observes that there still appears to be some questions about whether AT&T maintains market power or is fully constrained by competition in the interstate, interexchange market inasmuch as the Commission only saw fit to reclassify AT&T as nondominant in that market subject to numerous conditions. *See Motion of AT&T Corp. to Be Reclassified as a Non-Dominant Carrier*, 1 C.R. 63 (P&F) (1995).

¹⁴ *Notice* ¶¶ 30-31.

Nonetheless, CWI does believe that if carriers have the choice *not* to file tariffs, competition would be promoted.

In light of its tentative conclusions, the Commission proposes to eliminate the tariff filing requirement. Because CWI agrees that the requirements of Section 10 of the Communications Act have been met, CWI concurs that mandatory tariffing should no longer be enforced.¹⁵

III. TARIFFING SHOULD BE PERMISSIVE

In the *Notice*, the Commission not only proposes to forbear from enforcing the Section 203 requirement that nondominant IXC's file tariffs, but also tentatively concludes that the carriers be *prohibited* from filing such tariffs.¹⁶ CWI disagrees with the Commission's proposal to prohibit tariff filings and submits that, because nondominant IXC's remain subject to common carrier obligations under sections 201 and 202 of the Communications Act, as well as the Commission's complaint processes, such IXC's should be permitted to file tariffs with the Commission if they choose. As explained below, a regime

¹⁵ The FCC also seeks comment on whether carriers with tariffs offering both domestic and international services should be required, assuming the elimination of the requirement to file domestic interstate tariffs, to file international tariffs as well. *Notice* ¶ 33 & n. 85. CWI submits that if and when the FCC forbears from requiring the filing of international rates, terms, and conditions, it must do so in a manner that is evenhanded to all international carriers. Thus, carriers with bundled international/domestic services should be relieved from the tariff filing requirement of their international services only if other nondominant international carriers are also relieved of this requirement.

¹⁶ *Id.* ¶ 34.

of permissive tariffing for nondominant IXC's in the current marketplace will not lead to the anticompetitive consequences suggested in the *Notice*.

The Commission does not propose that mandatory detariffing is required by Section 10 of the Communications Act, albeit the proposal stems from its determination that mandatory tariffing is no longer required. Rather, the Commission's proposal flows from policy considerations. Specifically, the Commission believes that nondominant IXC's would potentially engage in anticompetitive conduct.¹⁷ Moreover, the Commission states that continuing to allow tariffs may lead to the possible invocation of the "filed rate doctrine," allowing carriers to unilaterally change the rates, terms, and conditions of long term contracts.¹⁸ In short, the objective of the Commission, in proposing mandatory detariffing, seems to be to make the legal relationship between carriers and customers more closely resemble that between services providers and customers in an unregulated environment.¹⁹

CWI submits that detariffing should be permissive not mandatory. Despite the Commission's stated objective, the relationship between carrier and customer is not and will not be -- mandatory detariffing notwithstanding -- analogous to that between service provider and customer in an *unregulated* environment. To the contrary, nondominant IXC's are common carriers and will for the foreseeable future be subject to Title II regulations and obligations in providing their services. Specifically, IXC rates, terms, and conditions must

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

be just, reasonable, and not unreasonably discriminatory.²⁰ In addition, IXC's remain subject to the Commission's complaint processes regarding alleged violations of the Communications Act.²¹

Thus, IXC's carry additional responsibilities and regulatory burdens that unregulated companies simply do not have. In such an environment, an IXC would be justified in publicly filing in advance the terms and conditions under which it will provide service, including reasonable limitations on liability. IXC's should not have to renegotiate these matters with each prospective customer.

Accordingly, CWI submits that IXC's should, if they choose, be permitted to file terms and conditions under which they will offer their interstate services. CWI proposes further that rate information not be filed with "permissive" tariffs. At a minimum, only maximum rates should be permitted.

Under such a permissive detariffing regime, there will be little or significantly reduced potential for anticompetitive price coordination, and therefore the voluntary filing of tariffs would not thwart the Commission's goal of eliminating opportunities for such anticompetitive conduct. If such activity occurred under these circumstances, it could not reasonably be considered a by-product of permissive detariffing. CWI's proposed regime of permissive detariffing also presents limited opportunity for invocation of the filed rate doctrine to change long-term contracts, as rates either would not be in the tariffs at all or would be set below the maximum rate, as CWI proposes in the alternative.

²⁰ 47 U.S.C. §§ 201(b) and 202(a).

²¹ 47 U.S.C. § 208; 47 C.F.R. § 1.711 ff.

In addition, given the level of competition in the marketplace for many interexchange services, nondominant IXC's are unlikely to alter terms and conditions in a manner adverse to users under permissive detariffing. Indeed, large telecommunications users possess leverage sufficient in the marketplace to discourage behavior deleterious to users' interests.²² Moreover, the Commission has emphasized that changes to long term contracts through tariff filings may be unjust and unreasonable unless the carrier meets the substantial cause test, further limiting the applicability of the filed rate doctrine.²³

Finally, under CWI's proposed permissive detariffing regime, nondominant IXC's would not have to file a tariff each time they changed rates.²⁴ Accordingly, they would have the flexibility to change rates in response to market conditions at reduced costs to both carriers and the agency, furthering a key Commission objective highlighted in the *Notice*. At the same time, both carrier and customer would know up front what the terms and conditions of service will be.

IV. CONCLUSION

For the foregoing reasons, the Commission should no longer require nondominant IXC's to file interstate tariffs. However, the Commission should permit nondominant IXC's to

²² *Tariff Filing Requirements for Nondominant Common Carriers*, 78 R.R. 2d 1722 (1995) ¶ 11.

²³ *Id.* ¶¶ 13, 16.

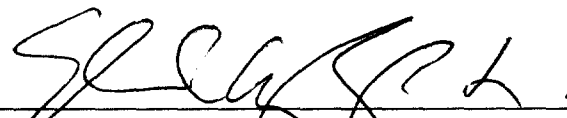
²⁴ Only under a maximum rate scheme -- CWI's alternative -- would changed rates potentially lead to a new tariff, *i.e.*, if the new rate exceeded the maximum. But in today's competitive marketplace, nondominant carriers would be unlikely to exceed the maximum rate.

file service terms and conditions in tariffs if they choose. Rate information should not be accepted or, at most, only maximum rates should be allowed, enhancing carrier flexibility to change rates in response to market conditions while minimizing applications of the filed rate doctrine.

Respectfully submitted,

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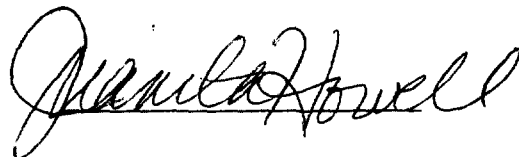
April 25, 1996

CERTIFICATE OF SERVICE

I do hereby certify that on this 25th day of April, 1996, true and correct copies of the foregoing *Comments of Cable & Wireless, Inc.* were service, by first class mail, postage prepaid, to:

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A handwritten signature in cursive script, appearing to read "Janice Howell", written in dark ink.